Supreme Court U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

(2)

No. 01-1172

IN THE

Supreme Court of the United States

THE PINEY RUN PRESERVATION ASSOCIATION,

Petitioner,

v.

COUNTY COMMISSIONERS
OF CARROLL COUNTY, MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

KELLY HUGHES IVERSON
Counsel of Record
LINDA S. WOOLF
K. NICHOLE NESBITT
GOODELL, DEVRIES,
LEECH & DANN, LLP
Attorneys for Respondent
One South Street
20th Floor
Baltimore, MD 21202
(410) 783-4000

173479

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Introduction	1
Misstatements By Petitioner Of Fact And Law	2
A. Petitioner's Misstatements of Fact	2
B. Petitioner's Misstatements of Law	5
Objections To Consideration Of Questions Presented By Petitioner	7
Reasons for Denying the Writ	9
A. The Fourth Circuit's Decision Is Not in Conflict with the Decisions of Other Courts of Appeals.	9
B. The Fourth Circuit's Decision Is Not in Conflict with any Decisions of This Court.	12
C. The Fourth Circuit Followed the Accepted Course of Judicial Proceedings in Deciding This Matter.	13
D. This Case Does Not Present Important Questions that Warrant Consideration by This Court.	14
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Arkansas v. Oklahoma, 503 U.S. 91, 112 S. Ct. 1046 (1992) 6, 7

Atlantic States Legal Foundation v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1994) 10, 12

Chevron, U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778 (1984) 7, 13

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S. Ct. 1784 (1981) 12

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 97 S. Ct. 965 (1977) 12

Environmental Protection Agency v. California, 426 U.S. 200, 96 S. Ct. 2022 (1976) 6

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S. Ct. 376 (1987) 12

In re Ketchikan Pulp Co., 7 E.A.D. 605, 1998 WL 284964 (EPA 1998) 10

National Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 5, 9

Cited Authorities

	Page
Northwest Environmental Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995)	6, 11
PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994)	6
Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546 (5th Cir. 1996)	5, 9
United States v. Frezzo Brothers, Inc., 602 F.2d 1123 (3d Cir. 1979)	5, 9
Upper Chattahooochee Riverkeeper Fund, Inc. v. City of Atlanta, 953 F. Supp. 1541 (N.D. Ga. 1996)	11
Woodward v. The Maryland Department of the Environment, (Md. Ct. Spec. App., No. 1660, Sept. term 1997)	4, 5, 8
Statute:	
33 U.S.C. § 1342(k)	2, 10
Rules:	
SUP. CT. R. 10	9
SUP. CT. R. 10(a)	8

INTRODUCTION

The Petition before this Court arises from the Fourth Circuit's decision in *The Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, No. 00-1283, published at 268 F.3d 255 (2001). In vacating the lower court's decision, the Fourth Circuit held that the County Commissioners of Carroll County ("the County") were shielded from liability under the Clean Water Act by virtue of the County's National Pollutant Discharge Elimination System (NPDES) permit, which authorized the discharge of treated effluent from the Hampstead Wastewater Treatment Plant ("the Plant").

The Fourth Circuit's lengthy, well-reasoned opinion[1] receives support from a similar decision by the Second Circuit, as well as the interpretation of the Environmental Protection Agency (EPA), the permitting authority. As the decision is consistent with the decisions this Court, the Courts of Appeals of other circuits, and the record, a writ of certiorari is not warranted and the Petition should be denied.

---

1. The Fourth Circuit's opinion appears in the Appendix of the Petition for Writ of Certiorari. References in this Opposition to the Fourth Circuit's opinion are made pursuant to the page numbers in the Petitioner's appendix.

MISSTATEMENTS BY PETITIONER OF FACT AND LAW

Petitioner makes several erroneous statements of fact and law in its Petition that should not be accepted by the Court.

A. Petitioner's Misstatements of Fact

First, Petitioner mischaracterizes the procedural background of the case. Petitioner states that the County argued in its Motion for Summary Judgment that it could only be liable for discharges in excess of the water quality standard. (Pet. at 6). However, in actuality, the County presented numerous arguments to the District Court, including the argument addressed by the Fourth Circuit that its compliance with all limitations in the permit must be deemed compliance for the purposes of the Citizen Suit provision of the Clean Water Act, 33 U.S.C. § 1342(k). Such arguments are reflected in various papers before the District Court, including the County's Memorandum in Further Support of its Cross-Motion for Summary Judgment and in its Motion for Reconsideration following the District Court's final order.

Petitioner further misrepresents that the County did not introduce any evidence at trial that it had disclosed its "addition of heat" to MDE before the 1990 permit was issued. (Pet. at 7). However, the County introduced both documentary and testimonial evidence that the temperature of its effluent was fully disclosed to MDE. The County offered the testimony of a County representative, James Slater, and an MDE representative, James Dieter, to demonstrate that the County reported the temperatures of its effluent to MDE before, during, and after the issuance of its

current permit and the proposed permit modification. (Pet. at App. 31-32). The County also offered a sampling of monthly reports that had been submitted to MDE regarding various aspects of the effluent, including temperature. (*Id.*). The Fourth Circuit relied on this information — which was in the record — in reaching its decision. Petitioner's argument that the County introduced no evidence in this regard is incorrect.

Next, Petitioner misstates that temperature data collected by the County between 1996 and 1998 showed that the County added "thermal pollution" to the stream on 371 of 397 days measured. (Pet. at 6). In actuality, the record demonstrates that this data was not gathered for regulatory or compliance purposes; was not measured with instruments or in a manner sufficiently precise to meet regulatory standards; and, most importantly, did not include any records of temperatures downstream of the discharge. Instead, it merely reflected that, on some days, the temperature of the effluent *in the pipe* was one or two degrees higher than the stream temperature at various upstream locations. Thus, the record was totally inadequate to conclude that the effluent temperature caused "thermal pollution" to the Piney Run between 1996 and 1998.

In addition to misstating the procedural history, Petitioner mischaracterizes the Fourth Circuit's decision in several ways. First, it states that the Fourth Circuit found "de novo" that the County had adequately disclosed and MDE reasonably contemplated the discharge of heat. (Pet. at 9). This is incorrect. In reaching its decision, the Fourth Circuit relied on testimony that was presented to the District Court, both at the summary judgment stage and at trial. The fact that the Fourth Circuit disagreed with the District Court's interpretation of that evidence does not imply that it was a "de novo" decision.

More importantly, Petitioner mischaracterizes the Fourth Circuit's holding, stating that "the court concluded as a matter of law that . . . an agency's mere 'contemplation' of a discharge serves to incorporate unlimited amounts of that discharge into the permit." (Pet. at 9). On the contrary, the court specifically held that the temperature of the discharge would be limited to whatever is within the reasonable contemplation of MDE. (Pet. at App. 25-26). Thus, the County would not be permitted to discharge effluent of *any* temperature; it is limited to temperatures that are within the reasonable contemplation of MDE based upon its prior disclosures during the permitting process. Petitioner's characterization of the Fourth Circuit's holding is overly broad and misleading.

Petitioner also contends that the Fourth Circuit "acknowledged that the undisputed evidence proved that the County's discharges of heat violated the applicable water quality standard." (Pet. at 17). The Fourth Circuit made no such finding. In the discussion cited by Petitioner, the Fourth Circuit was merely reviewing the procedural history of the case, explaining that the District Court found violations of the Clean Water Act based on *its* interpretation of state water quality standards. (Pet. at App. 9-10). The Fourth Circuit made no assessment, however, of the evidence on which the District Court's decision was based, nor did it express agreement with the District Court's conclusion. (*Id.*). As a matter of fact, it vacated the District Court's decision and remanded the case to the District Court for entry of judgment in the County's favor. (Pet. at App. 32).

Finally, Petitioner improperly claims that the Fourth Circuit "did not consider the holding in ***Woodward*** [a Maryland Court of Special Appeals decision] that

MDE had not addressed the plant's thermal discharge." On the contrary, as explained more fully below, the court acknowledged the *Woodward* decision and found it irrelevant to the questions presented, because the decision related to the MDE's consideration of a 1991 modification to the County's permit, while the subject before the court was the alleged violations of the original permit.

B. Petitioner's Misstatements of Law

The majority of Petitioner's proposed reasons for granting the petition are based on misstatements of law. For instance, Petitioner cites *National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979), and *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546 (5th Cir. 1996), for the proposition that "a discharger may only add those pollutants allowed in the four corners of their permits." (Pet. at 12). This representation is patently false.

Each of these cases simply stands for the proposition that an individual or entity cannot discharge pollutants without a permit in the first instance. *Costle*, 568 F.2d at 1374; *Frezzo Bros.*, 602 F.2d at 1127-28; *Sierra Club*, 73 F.3d at 559. That was not disputed in this case and, in fact, the Fourth Circuit cited *Costle* for that proposition. However, none of these three cases dealt with the *scope* of limitations contained within a duly issued NPDES permit. Rather, in each of these cases, there were no permit limitations to interpret. Likewise, none of these cases involved the effect of disclosures by dischargers to permitting authorities in the permitting process. Thus, Petitioner's assertion that these cases hold that a discharger may only discharge those

pollutants specifically listed in the permit is entirely inaccurate. These cases are simply inapposite to the instant matter.

Similarly, Petitioner implies that numerous cases stand for the proposition that "a discharger violates the Act if its discharge contains a pollutant in quantities that violate either the applicable state water quality standard or the numerical effluent limitation in the permit." Petitioner cites *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S. Ct. 1900 (1994), *Environmental Protection Agency v. California*, 426 U.S. 200, 96 S. Ct. 2022 (1976), and *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046 (1992), in support of this assertion.

Petitioner's interpretation of these cases is overly broad. In actuality, none of these cases held that a discharger is flatly prohibited from discharging pollutants in violation of state water quality standards. *Northwest Environmental* and *EPA v. California* held that citizens may sue permit holders for violations of water quality standards *if those standards are incorporated into the permit*. 56 F.3d at 986; 426 U.S. at 223-24. *Jefferson County* held that a state is permitted to condition certification of a project on compliance with state standards. 511 U.S. at 711.

Arkansas held that the EPA could place limitations in a permit based on water quality standards and find a violation of the Clean Water Act if a discharger's effluent violates those standards, but the Court explicitly declined to address whether the Act itself mandates such action by the EPA, finding that it was within the EPA's discretion to require compliance with state water quality standards. The Court's

deference to the permitting authority in *Arkansas*, which was based in part on *Chevron USA, Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), is in accord with the Fourth Circuit's reliance on the same doctrine in the present case. Put simply, the cases cited by Petitioner involve interpretations of specific permit conditions, not a flat prohibition of discharges in violation of state water quality standards.

OBJECTIONS TO CONSIDERATION OF QUESTIONS PRESENTED BY PETITIONER

In addition to objecting to Petitioner's misstatements of fact and law, Respondent objects to this Court's consideration of Petitioner's third question presented. Specifically, Petitioner asks this Court to consider whether

> [a] federal court ha[s] the power to make legal the discharge of a pollutant not listed on a NPDES permit in quantities which the state permitting agency could not have permitted under its governing state law[.]

(Pet. at i, 21). Because Petitioner presents this question in terms of information that was not before the Fourth Circuit, it should not be addressed by this Court.

The thrust of Petitioner's argument here is that the Fourth Circuit's conclusion that MDE adequately contemplated the County's discharge of heat was necessarily incorrect, given a prior Maryland state appellate court decision vacating MDE's decision to approve a modification of the County's 1990 permit. (Pet. at 21). Petitioner claims that the Fourth Circuit's decision conflicts with the state court decision

because the state court held that the record in the administrative proceeding was inadequate to show that MDE had sufficient information to determine whether the proposed modification would satisfy the state water quality standards.

Petitioner's characterization of the issue, however, is misleading. The Maryland state appellate court decision to which Petitioner refers, *Woodward v. The Maryland Department of the Environment*, (Md. Ct. Spec. App., No. 1660, Sept. term 1997),[2] dealt with a 1991 proposed modification to the 1990 permit. The case before the Fourth Circuit related to alleged violations of the *original* 1990 permit, under which the County continued to operate after the *Woodward* court vacated the modified permit. More importantly, the result in *Woodward* turned on the inadequacy of the record *in that case*. The County proffered ample evidence to the District Court in *this* matter that the daily temperature of its effluent had been reported to MDE in monthly reports during the permitting process. Thus, the *Woodward* decision had no bearing on the issues presented to the Fourth Circuit,[3] and there is no conflict that warrants consideration by this Court.

---

2. It should be noted that *Woodward* is an unreported decision entered by the Maryland Court of Special Appeals, which is not a state court of last resort. Thus, any conflict between the Fourth Circuit's decision and the *Woodward* decision would not rise to the level warranting consideration by this Court. *See* SUP. CT. R. 10(a).

3. The Fourth Circuit acknowledged the *Woodward* opinion, pointing out that it related to "a modification of [the] 1990 permit" whereby the County proposed to increase the volume of its effluent. The Fourth Circuit explained that the issue in *Woodward* was whether MDE had "sufficiently analyzed whether the Plant would comply with state water quality temperature standards *in discharging the increased effluent*." Because the issue turned on the 1991 modified

(Cont'd)

REASONS FOR DENYING THE WRIT

Petitioners' misstatements and mischaracterizations aside, this is not a case that warrants a writ of certiorari. The Fourth Circuit's decision is not in conflict with any decision by this Court, any state court of last resort, or any other United States Court of Appeals, nor did the Fourth Circuit depart from the accepted and usual course of judicial proceedings in deciding this matter. Moreover, this case does not present an important question of federal law that needs to be settled by this Court at this time. *Cf.* SUP. CT. R. 10.

A. The Fourth Circuit's Decision Is Not in Conflict with the Decisions of Other Courts of Appeals.

Petitioner contends that the Fourth Circuit's interpretation of the "permit shield" doctrine conflicts with the interpretations of other Courts of Appeals. First, Petitioner offers the argument that other cases have held that dischargers are confined to the "four corners of their permits." (Pet. at 12). As explained above, however, the cases Petitioner cites for this proposition do not so hold. Rather, they hold simply that a National Pollutant Discharge Elimination System (NPDES) permit is required in the first instance before a discharger may discharge any pollutants. *See Costle*, 568 F.2d at 1374; *Frezzo Bros.*, 602 F.2d at 1127-28; *Sierra Club*, 73 F.3d at 559.

(Cont'd)
permit, however, the court deemed it irrelevant, stating that "the 1990 permit is the relevant permit for this case." *Piney Run Preservation Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 261 n.3 (4th Cir. 2001).

The parties do not dispute that a NPDES permit is required for the discharge of pollutants. The County held such a permit in this case. The question before the Fourth Circuit related to the *scope* of that permit. The court had to determine whether the County was permitted to discharge effluent which, on occasion, exceeded the temperature of the receiving water by one to two degrees for part of the day, when the permit contained no specific limitation relating to temperature of County's effluent even after the effluent temperature had been reported to MDE. (Pet. at App. 5-6).

The only Court of Appeals decision involving a similar question is *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994). In that case, the Second Circuit interpreted the "shield provision" of the Clean Water Act, 33 U.S.C. § 1342(k), as providing that compliance with a NPDES permit constitutes compliance with the Clean Water Act. *Id.* at 357. The court further stated that a discharger "may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *Id.* The Second Circuit's rationale was that the purpose of a NPDES permit is to "identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements." *Id.*

The Fourth Circuit followed the rationale of the Second Circuit in *Atlantic States*, explaining that the Environmental Appeals Board of the EPA approved this reasoning. As in *Atlantic States*, the Board determined that the NPDES permit covers all pollutants disclosed to the permitting authority during the permit application process. *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 at *12-13 (EPA 1998).

Utilizing this accepted framework, the Fourth Circuit held that the County's permit shielded it from liability under the Clean Water Act because it complied with the discharge limitations and reporting requirements of its permit, and its discharges were within the reasonable contemplation of the permitting authority at the time the permit was issued. (Pet. at App. 6). It set forth the precise testimony and documentary evidence on which it based this conclusion. (Pet. at App. 31).

Petitioner's second argument regarding a conflict among the circuits is similarly flawed. Petitioner argues that the Fourth Circuit's ruling conflicts with Ninth and Eleventh Circuit decisions holding that "citizens may sue for violations of water quality standards that have not been reduced to end-of-pipe effluent limitations." (Pet. at 17). This argument is meritless.

The Ninth and Eleventh Circuit cases cited by Petitioner indeed hold that citizens may sue for violations of water quality standards that have been incorporated into a discharger's permit. *Northwest Environmental*, 56 F.3d at 985; *Upper Chattahooochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541 551-52 (N.D. Ga. 1996). However, the Fourth Circuit's decision does not conflict with these holdings in any way. The Fourth Circuit merely determined that the permit issued to the County by MDE encompassed the effluent temperatures that had been reported to MDE throughout the permitting process. The effect of these temperatures on the state water quality standards was not addressed.

In short, Petitioner has not identified any Court of Appeals decisions that conflict with the reasoning applied

by the Fourth Circuit in this matter. On the contrary, the only Court of Appeals decision that addresses a similar issue — *Atlantic States* — is entirely consistent with the Fourth Circuit's rationale.

B. The Fourth Circuit's Decision Is Not in Conflict with any Decisions of This Court.

Contrary to Petitioner's contention, the Fourth Circuit's decision does not conflict with any of this Court's prior decisions. Petitioner's reference to *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987), and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784 (1981), is inapposite. The Court in those cases held simply that the discharge of pollutants is prohibited in the absence of NPDES permit, which is undisputed. Neither case related in any way to the application of the shield provision of the Clean Water Act in cases where a discharger is operating in compliance with a duly authorized NPDES permit.

Petitioner also cites *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S. Ct. 965 (1977), as conflicting with the Fourth Circuit's decision. This case dealt with the EPA's authority to issue regulations incorporating effluent limitations for classes of point sources. It did not relate to the scope of NPDES permits. Although a footnote at the end of the opinion discusses the shield provision as serving the "purpose of giving permits finality," *id.* at n.28, nothing in the Court's decision conflicts with the Fourth Circuit's determination here that a permit encompasses pollutants that were adequately disclosed to the permitting agency but not specifically limited in the permit.

This Court has not decided any cases that are in conflict with the Fourth Circuit's decision in this case. Accordingly, a writ of certiorari is not warranted.

C. The Fourth Circuit Followed the Accepted Course of Judicial Proceedings in Deciding This Matter.

The Fourth Circuit's lengthy opinion in this case contains a full explanation of the process used by the court in coming to its conclusion. The court explained that it utilized the two-part test spelled out in *Chevron, U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984) in interpreting the governing statutes at issue. (Pet. at App. 5-6). It then explained that it would rely on the EPA's own interpretation of the governing statute, which is appropriate under the *Chevron* analysis. (*Id.*).

Although Petitioner argues that the Fourth Circuit went beyond its authority in deeming MDE to have "issued a permit which that agency lacked the power to issue," this argument is not supported by the record. The Fourth Circuit was presented with evidence that "clearly demonstrated" that the County adequately disclosed the temperature of its effluent to MDE and that the temperature of its discharges were within the reasonable contemplation of MDE. (Pet. at App. 31). The Fourth Circuit made no determination regarding whether that information was consistent with state water quality standards; its only function was to interpret the scope of the permit issued by MDE. There simply is no support for the argument that the Fourth Circuit deviated from the accepted course of judicial proceedings in reaching its conclusion.

D. This Case Does Not Present Important Questions that Warrant Consideration by This Court.

The Fourth Circuit has broken no new ground in this matter. On the contrary, as stated above, the Fourth Circuit followed the reasoning of the Second Circuit and the Environmental Protection Agency itself in interpreting the scope of the permit issued to the County and the shield provision of the Clean Water Act. Petitioner has identified no issue that warrants review by this Court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent County Commissioners of Carroll County respectfully opposes the Piney Run Preservation Association's Petition for Writ of Certiorari.

Respectfully submitted,

KELLY HUGHES IVERSON
Counsel of Record
LINDA S. WOOLF
K. NICHOLE NESBITT
GOODELL, DEVRIES,
LEECH & DANN, LLP
Attorneys for Respondent
One South Street
20th Floor
Baltimore, MD 21202
(410) 783-4000